

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting in part Native allotment application F-024786.

Affirmed in part; reversed in part and case remanded.

1. Alaska: Native Allotments—Alaska National Interest Lands Conservation Act: Native Allotments

The right of an Alaska Native allotment applicant, provided by sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), to amend the description on his application where it designates land other than that which the applicant intended to claim at the time of application terminates upon the establishment, by the Secretary, after proper notice, of a date certain on which all requests for amendment must be received.

APPEARANCES: Andy Harrington, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for appellant; Joseph D. Darnell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Silas Solomon, an Alaska Native, was born in 1902 in Ketchumstock, Alaska, a now abandoned Native village located southwest of Eagle, Alaska. He married, raised a family, hunted, fished, trapped, and kept sled dogs there. In 1956, he moved his permanent home to Lake Mansfield, an area he had been using for subsistence purposes since 1940. He continued to trap in the Ketchumstock area until 1966, and thereafter used the area for hunting.

In a Native allotment application dated November 1, 1959, Solomon claimed 160 acres on the western shore of Lake Mansfield for his Native allotment. The Bureau of Indian Affairs (BIA) filed that application with the Bureau of Land Management (BLM) on January 29, 1960, where it was assigned serial number F-024786. Although the application stated that evidence of use and occupancy was attached to the application, apparently

none was submitted to BLM. Therefore, in a notice dated May 9, 1960, BLM requested that Solomon file such evidence by January 29, 1966, 6 years from the date of filing of the application.

In August 1965, Solomon filed with BLM an evidence of occupancy form, dated August 22, 1965, which did not contain any legal description of the occupied land. ^{1/} Therein, Solomon asserted use and occupancy from 1924, claiming improvements of "3 cabins & cache & tools at Ketchumstock Village on Forty Mile and Misquito fork river." He stated that he had cultivated 80 acres for hay. He explained: "In fact I have been living there all my life. It[']s the village where I was born. My parents, brothers buried there." Despite the lack of legal description, it is clear that Solomon was providing evidence of occupancy for land in or near Ketchumstock, not for the 160-acre parcel described in F-024786.

On a BLM form letter bearing the date October 27, 1965, and signed by him, Solomon checked two boxes, one marked "I want to amend my present application to include several parcels," the other stating "I will submit an amended application as soon as I can properly stake the lands and describe the[m]." A handwritten notation on the form letter states: "40 on original at Lake Mansfield, more to follow. 40 at Ketchumstock, 40 at Yerrick Crk—to total 160 acres." The record shows that Solomon sought the assistance of BIA to help him amend his application.

In a Native allotment application dated July 9, 1968, and filed with BLM on July 22, 1968, Solomon requested a parcel of "less than 1 acre" on Fish Creek, which is the outlet for Lake Mansfield. He alleged use for hunting, fishing, and trapping since 1940. BLM assigned the same serial number to this application, later referencing it as Parcel B.

In August 1969, BLM issued special instructions for U.S. Survey No. 5615 A & B for Solomon's allotment. In accordance therewith, BLM surveyed the Lake Mansfield parcel (Parcel A) under U.S. Survey No. 5615 A in two separate tracts, one of 39.96 acres and the other 118.82 acres, ^{2/} and the Fish Creek parcel (Parcel B) under U.S. Survey No. 5615 B. Following a September 25, 1969, field investigation, BLM recommended approval of Parcel B.

BLM field inspected Parcel A on September 19, 1972, finding little evidence of use and no improvements thereon. In his report dated January 29, 1973, the inspector posed the question: "Can the evidence

^{1/} The form, which was filled out in ink by Solomon, does contain the following undated pencil notation in the area provided for legal description: "Village Cabin in Sec. 24, 26N, 14E, CRM Parcel C."

^{2/} Apparently, this may have been to accommodate the Oct. 27, 1965, notice of amendment claiming "40 on original at Lake Mansfield, more to follow."

of use that was filed for Ketchumstock [in August 1965] be considered an 'Amendment' of the original application?" He then stated that if the answer were yes, "we will have to make a field examination of the Ketchumstock lands."

Approximately 2 years later, Terry Plummer, Tok BLM Office, wrote a note to Paul Shaw, BLM Adjudication, stating: "Questions raised in report dated 1/29/73 should be answered before proceeding." In response, an undated note to the file from Shaw states:

The other parcel filed for on 8/25/65 and apparently located at Ketchumstock, should be field examined. Although no land description is given you might contact the applicant to see what he wanted and report on it. Get him to sign the land description saying this is what he meant to apply for. [3/]

(Exh. T).

On May 24, 1977, Solomon accompanied a BLM examiner to the Ketchumstock parcel. In his report, the examiner recommended approval, finding that Solomon had continuously used the land for "some 56 years" (Exh. U at 5). The examiner also stated that the land contained the graves of "[h]is mother, two brothers, and several other family members" and that Solomon's family was the last to leave Ketchumstock. *Id.* In a letter to Solomon dated June 16, 1978, BLM informed him that it had found the Ketchumstock parcel proper for allotment. It then stated: "However, before we can request survey of this parcel it is necessary to have you sign the attached description so that the application received August 25, 1965, can be considered complete." On July 3, 1978, Solomon returned the signed description for a 40-acre parcel, which contained the statement: "This is a correct description of the land I have used and meant to apply for."

Nearly 5 years later, BLM sent a letter dated February 28, 1983, to Solomon, stating:

You have applied for 160 acres at Mansfield Lake, at least 80 acres at Ketchumstuk Village, and one acre at Fish Creek,
a total of at least 241 acres. [4/] The Native Allotment Act only allows you to apply for 160 acres.

3/ References in this decision to "Exh." are to documents appended to Solomon's statement of reasons.

4/ Ketchumstuk is another accepted spelling for the name of the village (BLM Answer at 3 n.6).

We need you to tell us how you want the 160 acres divided among your three parcels. It seems clear to us that you only want one acre at Fish Creek. Your intentions for Ketchumstuk Village and Mansfield Lake are not clear.

BLM then asked Solomon how many acres he wanted at those two locations.

In response thereto, a realty specialist with the Tanana Chiefs Conference informed BLM by letter dated April 22, 1983, that based on a representation made to him by Solomon's son-in-law, Solomon desired 159 acres at Lake Mansfield and 1 acre at Fish Creek. Solomon confirmed that in an affidavit dated July 21, 1983. Thereafter, BLM informed BIA that it considered Solomon's affidavit to be a relinquishment of Parcel C and that it was suspending action on Parcel C pending receipt of BIA concurrence that the affidavit was a relinquishment (Exh. EE). BIA expressly declined to concur that the affidavit represented a relinquishment.

On June 7, 1984, BLM issued a notice to Solomon styled "Survey Conformance Required." Therein, BLM construed the form letter bearing the date of October 27, 1965, as a "new 40-acre application at Mansfield Lake." Thus, it stated:

On December 18, 1971, the records of this office showed the lands in your allotment included a 40-acre tract at Mansfield Lake (Parcel A); a 1-acre tract at Fish Creek (Parcel B); and a 40-acre tract at Ketchumstock (Parcel C). The record also shows an intent to apply for 40-acres at Yerrick Creek. However, we have no record of an application being filed at Yerrick Creek.

BLM then requested that Solomon review enclosed survey plats, maps, and status plats, and it informed him that unless it received an objection within 60 days and he provided an amended application and facts supporting the amendment, it would consider the 39.96-acre parcel in U.S. Survey No. 5615 A to be the land sought as Parcel A, the 1.03 acres in U.S. Survey No. 5615 B to be the Parcel B lands, and the 40-acre parcel at Ketchumstock to be his Parcel C lands, for a total of approximately 81 acres.

The certified mail return receipt card in the file shows that Solomon's daughter, Irene Arnold, signed for the notice and it was returned to BLM with a June 21, 1984, postmark. On August 7, 1984, Alaska Legal Services Corporation (ALSC), acting on behalf of Solomon, requested a 2-week extension in which to reply to the June 7, 1984, notice. On August 14, 1984, BLM granted a 2-week extension. No timely response was made to that notice. Not until over 4 years later, on November 28, 1988, did BLM receive from BIA an affidavit signed by Solomon on June 3, 1987, identifying the land he intended to apply for as 119 acres at Lake

Mansfield, within U.S. Survey No. 5615 A, 1 acre at Fish Creek within U.S. Survey No. 5615 B, and 40 acres at Ketchumstock. ^{5/}

In a decision dated April 29, 1993, the Alaska State Office, BLM, rejected Solomon's 1988 attempt to amend Parcel A, concluding that Parcel A consisted of 39.96 acres as set forth in its 1984 survey conformance notice. It found that Parcel A had been legislatively approved under the provisions of section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1988), as to the 39.96 acres. It approved Parcel B, and it rejected Parcel C, concluding that "no application was ever received for Parcel C" (Decision at 4).

Counsel for Solomon filed an appeal of that decision challenging BLM's rulings regarding Parcels A and C.

The history of Solomon's Native allotment filings, as detailed above, clearly shows that through the years Solomon's assertions regarding the land he sought for allotment were not consistent. His original application in 1960 sought 160 acres at Lake Mansfield. His evidence of use and occupancy in support of that application related to other land in a different location, an indeterminate amount of acreage in or around the village of Ketchumstock. Although counsel for Solomon asserts that such evidence related both to acreage at Lake Mansfield and Ketchumstock, we reject that assertion. That document (Exh. E), which dates use of the land from 1924, is consistent with BLM's field report of the Ketchumstock parcel, which states that use commenced June 10, 1924 (Exh. U at 3). Solomon began using land in the Lake Mansfield area "about 1940" (Exh. U at 5). In 1965, Solomon expressed the desire to amend his application to claim 40 acres at Lake Mansfield, 40 acres at Ketchumstock, and 40 acres at Yerrick Creek. He also indicated that he would seek additional acreage at Lake Mansfield. The record contains no further mention by Solomon of land at Yerrick Creek.

In 1968, he filed an amended application for 1 acre at Fish Creek. In 1978, he returned a description of a 40-acre parcel at Ketchumstock to BLM, which contained the statement: "This is a correct description of the land I have used and meant to apply for."

In 1983, he swore that he wanted his Native allotment to be 159 acres at Lake Mansfield and 1 acre at Fish Creek. In 1987, he swore that he wanted 119 acres at Lake Mansfield, 1 acre at Fish Creek, and 40 acres at Ketchumstock.

^{5/} In the interim, on Nov. 22, 1985, BLM sought from BIA, and received on Dec. 4, 1985, its certification of Solomon's application for Parcel C.

On appeal, counsel for Solomon contends that this Board should rule that Solomon had a valid application for 160 acres at Lake Mansfield pending as of December 18, 1971, and that the Government is estopped from denying that Solomon applied for a 40-acre parcel at Ketchumstock. He asserts that the case should be remanded to BLM in order to process those applications and reduce the acreage to 160 acres in a manner least detrimental to Solomon. Counsel argues that BLM apparently interpreted the October 27, 1965, form letter as an "amended application" for purposes of reducing the acreage at Lake Mansfield from 160 acres to 40 acres, but not for purposes of applying for the other parcels mentioned therein (Ketchumstock and Yerrick Creek). He contends that BLM should be estopped from denying that Solomon applied for at least 160 acres.

BLM's position on appeal is rather straightforward. It asserts, regarding Parcel A, that Solomon's failure to respond timely to its survey compliance notice in 1984 resulted in the 39.96-acre parcel described therein as Parcel A becoming final and no longer subject to amendment.

In support of that assertion, it cites section 905(c) of ANILCA and Daniel Roehl, 103 IBLA 96, 100 (1988). As to Parcel C, it contends that Solomon never filed an application for Parcel C and that he has provided no evidence of having done so. BLM argues that estoppel clearly does not lie because there was no affirmative misrepresentation by BLM, an element necessary to support estoppel.

[1] Under the Act of May 17, 1906, as amended, a Native allotment applicant was entitled to up to 160 acres of "vacant, unappropriated, and unreserved" land upon satisfactory proof of substantially continuous use and occupancy of the land for a period of 5 years. 43 U.S.C. § 270-1 and 270-2 (1970) (repealed effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), with a savings provision for applications pending on Dec. 18, 1971). Section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1988), provided legislative approval of Native allotment applications pending before the Department of the Interior on or before December 18, 1971, subject to certain exceptions.

Section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), provides that:

An allotment applicant may amend the land description contained in his or her application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed.
 * * * Provided further, That no allotment application may be amended for location following adoption of a final plan of survey which includes the location of the allotment as described in the application or its location as desired by amendment.

While ANILCA provided for legislative approval of Native allotment applications pending with the Department as of a date certain, Congress recognized that such applications might have errors in land descriptions and, therefore, provided that Natives could amend those applications. However, the applicant could not add additional land or describe new land, but was required to show that the new description described the land originally intended to be claimed. Pedro Bay Corp., 78 IBLA 196, 201 (1984). In addition, in Angeline Galbraith, 97 IBLA 132, 146-47 (1985), we concluded that the right to amend provided by section 905(c) of ANILCA terminated upon the establishment by the Secretary, after proper notice, of a date certain on which all requests for amendment had to be received or by the adoption, after December 2, 1980, of a plan of survey for either the originally described or the newly described land. See Daniel Roehl, *supra*.

In this case, the record well attests that Solomon had provided BLM with conflicting information regarding what lands he desired for an allotment. Accordingly, in an attempt to sort out what lands Solomon desired, BLM reviewed the record and provided him with notice, dated June 7, 1984, that it had determined that the lands he intended to claim as his allotment as of December 18, 1971, totaled approximately 81 acres—39.96 acres at Lake Mansfield as Parcel A, 1.03 acres at Fish Creek as Parcel B, and approximately 40 acres at Ketchumstock as Parcel C. BLM arrived at this result despite the fact that the only consistent theme in Solomon's communications with BLM regarding his allotment was that he, at all times, desired 160 acres, and as recently as July 1983 had informed BLM that he wanted 159 acres at Lake Mansfield and 1 acre at Fish Creek.

Nevertheless, whatever can be said regarding BLM's conclusions concerning Solomon's intent, the record is clear that Solomon received BLM's 1984 notice. His daughter signed the certified mail return receipt card, and he does not now deny receipt. In addition, a representative of ALSC requested, and was granted, a 2-week extension of time in which to file a response to the notice, stating that "[i]t has come to our attention that Silas Solomon has a question about his survey." ALSC did not file any further request for extension. Further, Solomon made no objection to BLM's conclusion within the time allowed or as extended. Not until November 28, 1988, when BIA forwarded Solomon's affidavit, dated June 3, 1987, to BLM was there any indication in the record that Solomon was dissatisfied with BLM's June 1984 conclusions. On appeal, counsel for Solomon offers no explanation for Solomon's failure to timely respond to BLM's 1984 notice. Moreover, while Solomon's 1987 affidavit is consistent with his prior intent to claim 160 acres, he expresses a desire for 119 acres at Lake Mansfield, even though he never previously asserted a claim to that particular amount of acreage at that location.

We believe resolution of Solomon's entitlement to Parcel A acreage at Lake Mansfield turns on the fact that he received BLM's June 1984 notice and did not file any timely response. The purpose of the notice was to allow Solomon to review BLM's determination and provide timely objection.

The burden was on Solomon to come forward and object if he had a problem with the description provided by BLM. Even if the request for extension could be considered a timely objection, he did not file an amended application within the time, as extended. The Secretary provided the requisite notice required by section 905(c) of ANILCA. When no timely response was received, BLM's Parcel A description became binding on Solomon.

The purpose of notice and opportunity to object is to allow the Secretary to finalize the amendment process and to allow the Native to clarify any errors in the record. Otherwise, the Secretary is at the whim of the Native who continually shifts land descriptions and the Native might be bound by an erroneous conclusion by BLM regarding desired acreage. Notice protects both parties. In this case, Solomon did not take advantage of the protection offered by the notice.

We affirm BLM's rejection of the 1988 amended description for Parcel A and its conclusion that Parcel A was legislatively approved in accordance with section 905(a) of ANILCA, effective June 1, 1981, as to 39.96 acres.

We turn now to consideration of Parcel C, a description of which was also included in the June 1984 notice. BLM took the position in its decision that Solomon never filed an allotment application for Parcel C, and, therefore, he could not receive it. It continues to assert that position on appeal. For the reasons stated below, we reverse.

Taking the record as a whole, we find no justification for BLM's position regarding Parcel C. First, it is clear that BLM considered the document dated October 27, 1965, to be sufficient to amend Solomon's original application so as to apply for 40 acres of land at Lake Mansfield, rather than 160 acres. BLM later surveyed Parcel A in two separate tracts, one containing 39.96 acres, and it is that survey description that BLM utilized in its June 1984 notice. That same October 1965 document expressed Solomon's desire to amend his application to include 40 acres at Ketchumstock. Also his evidence of occupancy filed in August 1965 clearly related to acreage at Ketchumstock. ^{6/} BLM contacted Solomon and he accompanied BLM personnel to Ketchumstock in order to examine the land. Thereafter, as noted above, BLM contacted Solomon by letter to notify him that it found the land proper for allotment, but that "before we can request survey of this parcel it is necessary to have you sign the

^{6/} There is some indication that Solomon may have filed or considered filing for a trade and manufacturing site at Ketchumstock. In his August 1965 Native allotment occupancy form he stated: "[T]his is known as business & manufacturing land what I stake[.] let me know!" There is no indication in the record of any response from BLM.

attached description so that the application received August 25, 1965, can be considered complete." (Emphasis added.) Solomon signed the description for 40 acres. Later, in its survey compliance notice dated June 7, 1984, BLM informed Solomon that according to its records as of December 18, 1971, the lands in his allotment included a 40-acre tract at Ketchumstock. Thereafter, in 1985, BLM requested that BIA certify Solomon's application for Parcel C. BIA did so.

We find that Solomon filed an amended application for Parcel C. BLM's finding to the contrary is reversed. 7/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part and the case is remanded for action consistent with this decision. 8/

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

James L. Burski
Administrative Judge

7/ We need not address Solomon's claim of estoppel because we find he filed an application for Parcel C.

8/ We note that in BLM's June 1984 notice it stated that "Parcels A and C as described above qualify for legislative approval * * *."